

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
TSUNEZO KUSANO,  
Appellee.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Territory of Hawaii.

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FILED

OCT 30 1913



No. 2319

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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For the Petitioner, TSUNEZO KUSANO:

J. LIGHTFOOT, Esq., Kapiolani Building,  
Honolulu, Hawaii.

For the Respondent, RICHARD L. HALSEY, Esq.,  
U. S. Immigration Inspector in Charge at the  
Port of Honolulu:

ROBERT W. BRECKONS, Esq., United States  
District Attorney, Honolulu, Hawaii. [1\*]

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*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 61.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Statement [of Clerk U. S. District Court].**

**TIME OF COMMENCING SUIT:**

June 28, 1913: Verified petition for writ of *habeas corpus* filed and writ issued to the United States Marshal for the District of Hawaii.

**NAMES OF ORIGINAL PARTIES:**

Petitioner: TSUNEZO KUSANO.

Respondent: RICHARD L. HALSEY, Esq., U.  
S. Inspector of Immigration in charge at the Port  
of Honolulu.

**DATES OF FILING OF THE PLEADINGS:**

June 28, 1913: Petition.

July 3, 1913: Return of Richard L. Halsey.

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\*Page-number appearing at foot of page of original certified Record.

July 3, 1913: Motion for Discharge.

SERVICE OF PROCESS:

June 28, 1913: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into court with the following return by the said United States Marshal, to wit: "Received the within Petition, Order and Writ of Habeas Corpus this 28th day of June, A. D. 1913, and returned as executed this 28th day of June, A. D. 1913, by hand upon Richard L. Halsey, inspector in charge at the Port of Honolulu, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, [2] and handing to and leaving with him a certified copy of same."

HEARINGS:

July 3, 1913: Hearing on Motion for Discharge.

The above hearing was had before the Honorable Sanford B. Dole, Judge of said Court.

DECISION:

July 3, 1913: Decision Allowing Motion for Discharge and Ordering Petitioner Released from Custody.

JUDGMENT:

July 5, 1913: Judgment filed and entered.

PETITION FOR APPEAL:

August 15, 1913: Petition for Appeal filed and Order Allowing Same Signed. [3]

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the District of Hawaii, do hereby



certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; the account of the proceedings showing the service of the writ herein; the time when judgment herein was rendered and the Judge rendering the same, in the matter of the Application of Tsunezo Kusano for a Writ of *Habeas Corpus*, Number 61, in the United States District Court for the District of Hawaii.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 3d day of September, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk, United States District Court, Territory of Hawaii. [4]

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO KUSANO for a writ of Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable SANFORD B. DOLE, Judge of the District Court of the United States, in and for the District and Territory of Hawaii:

The undersigned, Tsunezo Kusano, at present detained in the Immigration Station, Honolulu, petitioner herein, respectfully shows unto your Honor:

**FIRST.**

That petitioner is a subject of the Empire of

Japan, and is now about thirty-four years of age.

### SECOND.

That petitioner first arrived in the Territory of Hawaii, in the month of January, 1899, and lived continuously in said Territory, first at Ewa, Island of Oahu, afterwards at Puunene, Island of Maui, and thereafter at Kihei, Island of Maui, until the 27th day of September, A. D. 1912, when petitioner went to Japan for a visit intending shortly to return to said Territory.

### THIRD.

That when petitioner returned to Japan as aforesaid, he left his wife, Sae Kusano, at Kihei aforesaid, where she is now residing; that it was never the intention of your petitioner to abandon his domicile in the Territory of Hawaii, but it was at all times his intention to return to Hawaii and go to Kihei where his work can be resumed by him.

### FOURTH.

That petitioner returned to Honolulu aboard the S. S. "Siberia" on the 26th day of May, A. D. 1913, and on or about the 29th day of May, 1913, was examined by a Board of Special Inquiry at Honolulu [5] aforesaid, and was denied a landing on the ground that he was suffering from a dangerous, contagious disease known as Trachoma; that at said examination, after testimony had been adduced, the following proceedings were had:

EDWIN FARMER (one of the members of the Board of Special Inquiry).—"I move that applicant be denied admission and returned to Japan on account of being certified by the examining surgeon as

afflicted with a dangerous, contagious disease.”

MERLEN J. MOORE (one of the members of the Board of Special Inquiry).—“I second the motion.”

HARRY B. BROWN (one of the members of the Board of Special Inquiry).—“It is so ordered.”

EDWIN FARMER.—“I am of the opinion that applicant is returning to an unrelinquished domicile in Hawaii, and would therefore be considered by the courts in this Judicial District as entitled to land although he is certified as afflicted with Trachoma. He has pursued his regular occupation in Hawaii, his family has been here, he has been absent only about seven months, and his trip to Japan was only a temporary one, and his family is still here.”

MERLEN J. MOORE.—“I am of the same opinion.”

HARRY B. BROWN.—“I concur.”

HARRY B. BROWN.—(To applicant.) “You have been denied admission and ordered returned to Japan by reason of the certificate of the *examining* that you are afflicted with Trachoma, a dangerous contagious disease. You cannot appeal on that question but you have the right of appeal on the question of domicile. The Board is of the opinion that you are a returning resident of Hawaii. Do you desire to give notice of appeal now, do you want time to consider, or will you waive your right of appeal? You have 48 hours in which to decide if you so desire.”

A. “I will give notice of appeal now.”

HARRY B. BROWN.—(To applicant.) “Should your appeal be dismissed [6] you will be returned

to Japan at the expense of the steamship company which brought you to Hawaii.

#### FIFTH.

That an appeal from the decision of the Board of Special Inquiry was duly taken to the Secretary of Commerce and Labor and as petitioner is informed and believes, and upon such information and belief, alleges and avers, was overruled.

#### SIXTH.

That petitioner is imprisoned, confined, and deprived of his liberty at the Immigration Station, Honolulu, by Richard L. Halsey, Esquire, Inspector of Immigration of said Port of Honolulu, as petitioner is informed and believes and upon such information and belief, alleges and avers, under the claim that petitioner is an alien immigrant, suffering from a dangerous contagious disease, to wit, Trachoma, and your petitioner is further informed and believes and so alleges the fact to be, that petitioner will be deported to Japan by said Richard L. Halsey, at an early date unless the relief prayed for be granted by this Honorable Court.

#### SEVENTH.

That said imprisonment, restraint and confinement is illegal in this, that your petitioner is not an alien immigrant, but is a domiciled alien, and as such, cannot be legally imprisoned as aforesaid under the laws of the United States of America.

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus* directed to said Richard L. Halsey, Immigration Inspector as aforesaid,

may issue in this behalf so that your petitioner may be brought before this Honorable Court to do, submit to and receive what the law may direct.

Dated Honolulu, June 26th, A. D. 1913.

(Sgd.) In Japanese (TSUNEZO KUSANO).

Witness to signature:

(Sgd.) F. K. MAKINO. [7]

United States of America,  
Territory of Hawaii,—ss.

Tsunezo Kusano, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that said statements are true as he verily believes.

(Sgd.) In Japanese (TSUNEZO KUSANO).

Witness to signature:

(Sgd.) F. K. MAKINO.

Subscribed and sworn to by said Tsunezo Kusano before me and by me subscribed on this 27th day of June, A. D. 1913.

[Seal] (Sgd.) B. N. KAHALEPUNE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Let the writ issue as herein prayed, returnable before me on the 1st day of July, A. D. 1913.

Dated, Honolulu, T. H., June 26th, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge of the United States District Court, Territory  
of Hawaii.



*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Writ of Habeas Corpus.**

The United States of America to RICHARD L.  
HALSEY, Esquire, United States Immigration  
Inspector, at the Port of Honolulu, Territory of  
Hawaii.

WE COMMAND YOU that the body of Tsunezo  
Kusano, in your custody detained, as it is said, to-  
gether with the day and cause of his caption and de-  
tention, you safely have before the Honorable San-  
ford B. Dole, Judge of our District Court of the  
United States, in and for the District and Territory  
of Hawaii, on Tuesday, the 1st [8] day of July,  
A. D. 1913, at the hour of 10 o'clock A. M. of said  
day, to do and receive all and singular those things  
which said Judge shall then and there consider of  
him in this behalf; and have you then and there this  
writ.

Witness the Honorable SANFORD B. DOLE,  
Judge of the District Court of the United States, in  
and for the District and Territory of Hawaii, this  
28th day of June, A. D. 1913.

[Seal]

A. E. MURPHY,  
Clerk.

By (Sgd.) Wm. L. Rosa,  
Deputy Clerk.

**MARSHAL'S RETURN.**

Received the within Petition, Order and Writ of

*Habeas Corpus* this 28th day of June, A. D. 1913, and returned as executed this 28th day of June A. D. 1913, by hand upon Richard L. Halsey, Inspector in Charge at the Port of Honolulu, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, and handing to and leaving with him a certified copy of same.

(Sgd.) E. R. HENDRY.

United States Marshal.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Petitioner for Writ of *Habeas Corpus*. Filed June 28, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [9]

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**[Order Allowing Motion for Discharge and Directing  
That Petitioner be Released from Custody, etc.]**

From the Minutes of the United States District Court, Vol. 8, Page 571, Thursday, July 3, 1913.

[Title of Court and Cause.]

On this day came Mr. J. Lightfoot, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, and this cause was called for hearing. Thereupon Mr. Lightfoot filed a Motion for Discharge, whereupon due argument having been had on said motion by respective counsel, the said motion was by the Court allowed and the petitioner ordered released from custody. Thereupon Mr. Bitting having given notice of appeal, it was by the Court ordered that said petitioner furnish a

recognizance herein in the sum of \$250.00, pending said appeal. [10]

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**[Return of U. S. Immigration Inspector to Writ of Habeas Corpus.]**

*In the United States District Court for the Territory of Hawaii.*

In the Matter of the Application of TSUNEZO KUSANO for a writ of Habeas Corpus.

RETURN OF RICHARD L. HALSEY, UNITED STATES IMMIGRATION INSPECTOR, AT THE PORT OF HONOLULU, TERRITORY OF HAWAII, TO THE WRIT OF HABEAS CORPUS ISSUED IN THE ABOVE-ENTITLED MATTER.

COMES NOW RICHARD L. HALSEY, and by way of return to the writ of *habeas corpus* in this cause issued says:

First. That he now here produces the body of Tsunezo Kusano as by said writ he is commanded to do.

Second. He admits the allegations contained in paragraphs first, second, third, fourth and fifth of said petition.

Third. Respondent shows in answer to paragraphs sixth and seventh of said petition that the petitioner is restrained and held for deportation under the orders of the Secretary of Labor, by reason of the fact that the said petitioner is not a citizen of the United States but is alien thereto, and that upon his arrival at the port of Honolulu, in the



United States of America, and his application for entrance into the United States therefrom, it was found and certified by a duly qualified officer of the Public Health and Marine Hospital Service, that the said petitioner was afflicted with a dangerous, contagious disease, and that thereupon the petitioner was informed that if he so desired he could have hospital treatment for said disease under the provisions of rule 19 of the Department in such matters made and provided, and permission was granted him for such hospital treatment which petitioner refused to accept, that by reason of the provisions of law the decision of the Board of Special Inquiry, confirmed by the Secretary [11] of Labor and based upon the certificate of the examining medical officer, became, was and is final as to the petitioner.

WHEREFORE, your respondent prays that the writ of *habeas corpus* heretofore issued may be discharged with costs to the petitioner.

(Sgd.) RICHARD L. HALSEY,  
Immigration Inspector in Charge.

United States of America,  
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of *habeas corpus* in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 3d day of July, A. D. 1913.

(Sgd.) WM. L. ROSA,  
Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Return of Richard L. Halsey. Filed Jul. 3, 1913.  
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,  
Deputy. [12]

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*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Motion for Discharge of Petitioner.**

Now comes Tsunezo Kusano, petitioner above named, by J. Lightfoot, his attorney, and moves this Honorable Court for an order herein granting the discharge of said petitioner from custody.

This motion is based on the pleadings filed, and proceedings had in the above-entitled court and cause.

Dated Honolulu, July 2d, A. D. 1913.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Motion for Discharge of Petitioner. Filed Jul. 3,  
1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L.  
Rosa, Deputy Clerk. [13]

*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Recognizance.**

The United States of America,  
Territory and District of Hawaii,—ss.

Be it remembered, that on the 5th day of July, A. D. 1913, before me, Foster L. Davis, Deputy Clerk of the District Court of the United States within and for the Territory and District of Hawaii, duly appointed by said Court and duly qualified and acting as such Deputy Clerk, personally came Tsunezo Kusano, as principal, and M. Tsuchiyama and F. K. Makino, as sureties, and jointly and severally acknowledged themselves to owe to the United States of America the sum of Two Hundred and Fifty Dollars (\$250.00), to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION OF THIS RECOGNIZ-  
ANCE is such, that whereas, by the judgment of the above-entitled court in the above-entitled action dated July 5th, 1913, the above-named Tsunezo Kusano was ordered discharged from custody, subject to the taking of an appeal; and

WHEREAS, said Court, being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings in that behalf, fur-

ther ordered that said Tsunezo Kusano give his recognizance with surety in the sum and amount of Two Hundred and Fifty Dollars (\$250.00) to answer the judgment of the Appellate Court, and that, upon the giving of such recognizance, said Tsunezo Kusano shall answer, abide by and render himself in execution of, and obey, all orders and judgment of the Appellate Court herein whether that Appellate Court be the United States Circuit Court of Appeals for the [14] Ninth Circuit, or the Supreme Court of the United States, and in all respects subject himself to whatever action may be taken in or by such Appellate Court, then this recognizance to be void; otherwise to remain in full force, virtue and effect.

(Sgd.) In Japanese,

Principal.

(Sgd.) M. TSUCHIYAMA,

Surety.

(Sgd.) F. K. MAKINO,

Surety.

Witness to signature in Japanese:

(Sgd.) WM. L. ROSA.

Taken and acknowledged before me the day and year first above written.

[Seal]

(Sgd.) F. L. DAVIS,

Deputy Clerk, United States District Court.

United States of America,

Territory and District of Hawaii,—ss.

M. Tsuchiyama and F. K. Makino, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is worth the sum of Two Hundred and Fifty Dollars (\$250.00) over and above

his just debts, liabilities, and exemptions, and that his property is situate in said Territory and subject to execution.

(Sgd.) M. TSUCHIYAMA.

(Sgd.) F. K. MAKINO.

Subscribed in my presence and sworn to before me this 5th day of July, A. D. 1913.

[Seal] (Sgd.) F. L. DAVIS,

Deputy Clerk, United States District Court.

Approved as to form and as to sufficiency of sureties.

(Sgd.) C. C. BITTING,

Assistant United States District Attorney.

Approved:

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Judge.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Recognizance. Filed July 5th, 1913. A. E. Murphy,  
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [15]

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*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Judgment.**

At the regular April, A. D. 1913 Term, of the District Court of the United States, for the District and Territory of Hawaii, held in the courtroom of said court, in the City of Honolulu, District and Territory aforesaid, on Thursday, the 3d day of July, A. D.



1913, the above-entitled cause having been heard on the pleadings and arguments of counsel for the respective parties and due deliberation had thereon, the Court finds that the above-named petitioner, Tsunezo Kusano, is entitled to be discharged, subject to the taking of an appeal, in which case he may be released upon giving a recognizance with sureties in the sum of Two Hundred and Fifty Dollars (\$250.-00), to answer the judgment of the Appellate Court.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the above-named petitioner Tsunezo Kusano, be, and he is hereby discharged from custody herein, subject to the taking of an appeal.

And the Court being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings to be had in that behalf,

It is hereby further ordered, adjudged and decreed that the above-named petitioner, Tsunezo Kusano, give his recognizance with surety in the sum of Two Hundred and Fifty Dollars to answer the judgment of the Appellate Court; and that upon the giving of such recognizance, the said petitioner, Tsunezo Kusano, be released from custody. [16]

Given, made and dated at Honolulu, Territory of Hawaii, this 5th day of July, A. D. 1913.

(Sgd.) SANFORD B. DOLE,

Judge.

O. K.—(Sgd.) C. C. B.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Judgment Entered in J. D., Book 2, at folio 427.

Filed Jul. 5, 1913. A. E. Murphy, Clerk. By  
(Sgd.) Wm. L. Rosa, Deputy Clerk. [17]

---

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Petition for Appeal.**

To the Honorable SANFORD B. DOLE, Judge of  
the Above-entitled Court:

THE UNITED STATES OF AMERICA, by its  
attorney, C. C. BITTING, conceiving itself aggrieved  
by the order and judgment made and entered on the  
5th day of July, A. D. 1913, in the above-entitled pro-  
ceeding, does hereby appeal from the said order and  
judgment to the Circuit Court of Appeals for the  
Ninth Circuit, and files herewith its assignment of  
errors intended to be urged upon appeal, and it prays  
that its appeal may be allowed, and that a transcript  
of the record of all proceedings and papers upon  
which said order and judgment was made, duly  
authenticated, may be sent to the Circuit Court of  
Appeals for the Ninth Circuit of the United States.

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above petition.

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By his Attorney,

---

[18]

[Endorsed]: No. 61. (Title of Court and Cause.)  
Petition for Appeal. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [19]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Order Allowing Appeal.**

Upon application and motion of C. C. BITTING,  
Assistant United States Attorney for the Territory  
of Hawaii:

IT IS HEREBY ORDERED that the petition for  
appeal heretofore filed herein by the United States  
of America be, and the same is hereby granted; and  
that an appeal to the United States Circuit Court of  
Appeals for the Ninth Circuit from the final order  
and judgment heretofore, on July 5th, 1913, filed  
and entered herein, be and the same is hereby allowed,  
and that a transcript of the record of all proceedings  
and papers upon which said final order and judgment  
was made, duly certified and authenticated, be trans-  
mitted, under the hand and seal of the Clerk of this  
Court, to the United States Circuit Court of Appeals  
for the Ninth Judicial Circuit of the United States,  
at San Francisco, in the State of California.

Dated this 15th day of August, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge U. S. District Court.



Received a copy of the above order.

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By his Attorney,

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[20]

[Endorsed]: No. 61. (Title of Court and Cause.)  
Order Allowing Appeal. Filed Aug. 15, 1913. A.  
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [21]

---

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Assignment of Errors.**

And now comes the United States of America, by  
C. C. BITTING, its attorney, and says that in the  
record and proceedings in the above-entitled matter  
there is a manifest error, and that the final record  
and judgment, made and entered in said matter on  
the fifth day of July, A. D. 1913, is erroneous and  
against the just rights of the said United States, in  
this, to wit:

First. That the Court erred in issuing the writ of  
*habeas corpus* as prayed for in the petition, the  
Court having no jurisdiction in the premises.

Second. That the applicant being afflicted with a  
dangerous, contagious disease, to wit, trachoma, and  
under the provisions of law, was properly denied ad-  
mission into the United States.

Third. That the applicant having denied and  
refused the leave granted him for hospital treatment

under the provisions and regulations of the Department of Labor, the Court was in error in permitting him to be landed and in sustaining the writ of *habeas corpus* issued in said cause. [22]

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above assignment of errors.

---

By his Attorney.

---

[Endorsed]: No. 61. (Title of Court and Cause.)  
Assignment of Errors. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [23]

---

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States, to Tsunezo  
Kusano, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the

Territory of Hawaii, wherein the United States of America is appellant, and you, Tsunezo Kusano, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. [24]

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 15th day of August, A. D. 1913, and of the Independence of the United States the one hundred and thirty-eighth.

S. B. DOLE,

Judge U. S. District Court, District of Hawaii.

[Seal]

Attest: A. E. MURPHY,

Clerk U. S. District Court.

Received a copy of within citation.

\_\_\_\_\_,  
By his Attorney:  
\_\_\_\_\_.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Citation on Appeal. Filed August 15, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [25]

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition for writ of *habeas corpus* and writ, filed June 28, 1913.
2. Return of Richard L. Halsey, filed July 3, 1913.
3. Motion for discharge of petitioner, filed July 3, 1913.
4. Recognizance, filed July 5, 1913.
5. Judgment, filed July 5, 1913.
6. Petition for appeal, filed \_\_\_\_\_.
7. Assignment of errors, filed \_\_\_\_\_.
8. Order allowing appeal, filed \_\_\_\_\_.
9. Citation, filed \_\_\_\_\_.
10. All minute entries in above-entitled cause.
11. This praecipe. [26]

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, before

the 15th day of September, A. D. 1913.

THE UNITED STATES OF AMERICA,

By (Sgd.) C. C. BITTING,

Assistant United States Attorney.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Praeceptum for Transcript. Filed Aug. 8, 1913. A. E.  
Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy  
Clerk. [27]

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**[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]**

*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 61.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 28, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the Matter of the Application of Tsunezo Kusano for a Writ of *Habeas Corpus*, as the same remains of record and on file in my office, and I further certify that I herewithunto annex the original Citation on Appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$6.90, and that said amount

has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 3d day of September, A. D. 1913.

[Seal] A. E. MURPHY,  
Clerk, United States District Court, Territory of  
Hawaii. [28]

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[Endorsed]: No. 2319. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tsunezo Kusano, Appellee. In the Matter of the Application of Tsunezo Kusano for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received and filed September 15, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,	}
vs.	
TSUNEZO KUSANO,	
	<i>Appellant,</i>
	<i>Appellee.</i>

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IN THE MATTER OF THE APPLICATION OF  
TSUNEZO KUSANO FOR A WRIT OF HABEAS  
CORPUS.

**BRIEF OF APPELLANT**

Upon Appeal from the United States District Court for  
the Territory of Hawaii.

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STATEMENT OF THE CASE.

This is an appeal on the part of the government from a judgment of the District Court of the United States in and for the District of Hawaii discharging upon a writ of *habeas corpus* the said Tsunezo Kusano. The District Court of Hawaii evidently determined the case upon the pleadings.

The petition for the writ of *habeas corpus* sets

forth that the petitioner is a subject of the Emperor of Japan; that he arrived in Hawaii first in the month of January, 1899, and lived there continuously until the 27th day of September, 1912, when petitioner went to Japan for a visit; that when he returned to Japan he left in Hawaii a wife, who is now residing in Hawaii; that he returned to Honolulu on the steamship "Siberia" on the 26th of May, 1913, and being examined by a Board of Special Inquiry, was denied a landing on the ground that he was suffering from a dangerous, contagious disease known as trachoma. He sets forth the proceedings of the Board of Special Inquiry in which they denied him a landing on the ground that he is afflicted with trachoma; they held that he is domiciled in Hawaii under the decisions of the Judicial District and that he has not relinquished his domicile in Hawaii according to the view of the law held by the Courts of the Judicial District of Hawaii; that he appealed from the decision of the Board of Special Inquiry to the Secretary of Commerce and Labor, which appeal was overruled; and that one Richard L. Halsey, Inspector of Immigration, will deport petitioner to Japan unless relief is granted by the Court. A further allegation is made that the petitioner is not an alien immigrant but is a domiciled alien and as such cannot be legally imprisoned under the laws of the United States.

The return of the Immigration Inspector sets forth that he is holding the alien under orders of the Secretary of Labor for deportation by reason of the fact that the petitioner is not a citizen of the United



States but an alien and that upon his arrival at Honolulu and his application for entrance into the United States it was found and certified by a duly qualified officer of the Public Health and Marine Hospital Service that the alien was afflicted with a dangerous, contagious disease and that if he so desired he could have hospital treatment for said disease under the provisions of rule 19 of the Department and permission was granted him for such hospital treatment which petitioner refused and that by reason of the provisions of law the decision of the Board of Special Inquiry, confirmed by the Secretary of Labor and based upon the certificate of the examining medical officer, became, was and is final as to the petitioner.

The attorney for the petitioner thereupon moved to have the petitioner discharged, basing said motion upon the pleadings, whereupon the Court gave its judgment discharging the petitioner.

### THE LAW OF THE CASE.

The respondent contends that the order of the Court below discharging the petitioner on a writ of *habeas corpus* should be reversed and the petitioner remanded to the custody of the immigration authorities for deportation, on two grounds:

FIRST: THAT THE COURT HAD NO JURISDICTION TO ENTERTAIN THE PETITION UNDER THE ALLEGATIONS OF THE PETITION AND THE EVIDENCE PRESENTED.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING

THE ALIEN FROM ADMISSION TO THE UNITED STATES  
WAS PROPER.

Under the first heading it will be observed that there is no allegation in the petition alleging the setting forth of a denial of a fair hearing to the petitioner on the part of the Board of Special Inquiry or the Secretary of Labor. Such being the case, the matter is governed by the decision of the *United States vs. Ju Toy*, 198 U. S. 253, 40 L. Ed. 1040.

"We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United State vs. SingTuck*, 194 U. S. 161, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621: 'A petition for *habeas corpus* ought not to be entertained unless the Court is satisfied that the petitioner can make out at least a *prima facie* case.' This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect."

The finding of the Secretary of Labor that the alien is not domiciled in the United States is conclusive upon the alien.

*United States vs. Ju Toy*, 198 U. S. 1043;  
*United States vs. Sing Tuck*, 194 U. S. 168, 48  
L. Ed. 917;  
*United States vs. Chin Low*, 208 U. S. 8, 52 L.  
Ed. 369;  
*Ecker vs. United States*, 142 U. S. 651;  
*How Moy vs. North*, 183 Fed. 89.

The basis for jurisdiction for the issuance of a writ of *habeas corpus* by the District Court is

based entirely upon the question as to whether or not the alien has been given a fair hearing by the immigration authorities.

*United States vs. Chin Yow, supra.*

"Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. \* \* \*

"We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce; or rule 7, commented on in *United States vs. Sing Tuck*, 194 U. S. 161, 169, 170, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In this case there is no allegation or proof whatsoever tending to show that the alien was not given a fair hearing in this matter, and the Secretary's ruling

must prevail. The allegation that he is a domiciled alien does not take his case out from under the reasoning of those cases, for in each of the cases I have cited the alien claimed to be a citizen of the United States. With much stronger force would the same reasoning apply to the alien claiming domicile.

The reasoning in these cases is not confined to the Chinese Exclusion Act, but is likewise applicable to cases arising under the Immigration Act.

*United States vs. Low Wah Suey*, 225 U. S. 460.

The terms of the Immigration Act under which this alien was ordered deported provides:

“Sec. 6. That the decision of the Board of Special Inquiry hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to rejection of aliens afflicted with tuberculosis or with a loathsome or dangerous, contagious disease or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission into the United States under section 2 of this Act.”

Section 25 is the matter referred to in section 10, which section, after providing for the appointment of boards of special inquiry, is as follows:

“Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members

of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of such decision, which shall be rendered solely upon the evidence adduced before the Board of Special Inquiry; *provided*, that in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act."

It thus appears that the order of the Board of Special Inquiry excluding the alien, based upon the medical certificate that the alien was suffering with a dangerous, contagious disease, is final and the Court has no power nor authority to review its decision.

The contention of the alien that he domiciled in the United States and therefore not subject to the immigration laws has been decided adversely by the Supreme Court.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, opinion by Justice Whitney, rendered January 5, 1914. Advance Sheets Lawyers' Edition, Feb. 14, 1914, page 196.

The transcript (Tr. ) affirmatively shows that the alien was offered hospital treatment and refused the same, thereby not complying with Immigration rule 19 for the admission of aliens. Not having exhausted his remedy in the department, he is not entitled to apply to the courts.

*United States vs. Sing Tuck*, 194 U. S. 168;  
*United States vs. Jew Toy*, 198 U. S. 1043;  
*Eiku vs. United States*, 142 U. S. 651.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING THE ALIEN FROM ADMISSION TO THE UNITED STATES WAS PROPER.

Without waiving in any way the position hereinbefore taken, we contend that the alien should be deported on the record made out before the Board of Special Inquiry. The alien although domiciled in the United States, when he has left the same and presents himself for readmission to the United States is in the same position as any other alien who may never have been in the United States before.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, Advance Sheets Lawyers' Edition, Feb. 1, 1914, page 196.

The alien was suffering from a loathesome, dangerous, contagious disease, to wit, trachoma, as is shown by the medical certificate of Dr. Trotter of the Public Health and Marine Hospital Service at Honolulu and having refused medical treatment offered him under rule 19, of the Immigration Rules and Regula-



tions, is subject to deportation and should be refused admission under sections 2, 10 and 25 of the Immigration Act, which excluded aliens afflicted with tuberculosis or with a loathsome or dangerous contagious disease.

We contend that this case should be reversed and the alien remanded to the custody of the Immigration Inspector for deportation.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

EARL H. PIER,  
Special Assistant to United States Attorney,  
Attorneys for Appellant.

